

<sup>2</sup> Attorney Phelps entered his appearance in this matter on or about June 2, 2014.

Hearing (E-3) was received by the Division of Workers Compensation on February 29, 2012.

On June 5, 2014, respondent filed a motion to dismiss the claim pursuant to K.S.A. 44-523(f). On June 26, 2014, a hearing was held before ALJ John D. Clark on respondent's motion. On June 27, 2014, ALJ Clark sustained respondent's request to dismiss the claim pursuant to K.S.A. 44-523(f). Claimant appealed to the Board and filed a motion for reconsideration on June 30, 2014, with the ALJ. ALJ Clark retired and ALJ Thomas Klein was assigned the case. After a second hearing on July 17, 2014, in an Order also dated July 17, 2014, ALJ Klein denied claimant's motion to set aside ALJ Clark's dismissal order. Claimant then appealed the July 17, 2014, Order. Claimant has requested the two Orders be consolidated for the purposes of review by the Board.

Claimant requests review of whether K.S.A. 44-532(f) was properly applied or construed and questions the constitutionality of K.S.A. 44-523(f) both on its face and as applied in this claim. Claimant further contends the filing of the E-3 on February 29, 2012, extended the five year statute of limitations contained in K.S.A. 44-523(f).

Respondent argues both Orders of the ALJs' should be affirmed.

#### **FINDINGS OF FACT**

Claimant filed an Application for Hearing (E-1) on April 13, 2009, alleging a date of accident of February 6, 2009. An Application for Preliminary Hearing was filed on February 29, 2012. Neither application went to hearing at the time of the filings.

Respondent filed a Motion to Dismiss pursuant to K.S.A. 44-523(f) on June 6, 2014. The matter was originally heard and dismissed by ALJ Clark on June 27, 2014. A Motion to Reconsider was heard, with a resulting Order being issued, again dismissing the claim on July 17, 2014, by ALJ Klein. Both matters have been appealed to the Board, with claimant requesting a consolidation of the claims.

#### **PRINCIPLES OF LAW AND ANALYSIS**

K.S.A. 2008 Supp. 44-523(f) states:

(f) Any claim that has not proceeded to final hearing, a settlement hearing, or an agreed award under the workers compensation act within five years from the date of filing an application for hearing pursuant to K.S.A. 44-534, and amendments thereto, shall be dismissed by the administrative law judge for lack of prosecution. The administrative law judge may grant an extension for good cause shown, which shall be conclusively presumed in the event that the claimant has not reached maximum medical improvement, provided such motion to extend is filed prior to the five year limitation provided for herein. This section shall not affect any future

benefits which have been left open upon proper application by an award or settlement.

Claimant filed an Application For Hearing (E-1) pursuant to K.S.A. 44-534, on April 13, 2009. No final hearing, settlement hearing or agreed award under the Workers Compensation Act was held within five years from the date of filing the application for hearing. Respondent's motion to dismiss was filed on June 5, 2014.

Claimant contends the statute of limitations was somehow "reset" with the filing of the Application for Preliminary Hearing (E-3). The language of K.S.A. 2008 Supp. 44-523(f) does not support claimant's argument. It is the application for hearing (E-1) that begins the running of the statute of limitations in this matter. The filing of an application for preliminary hearing has no effect on the five year statutory limitation. K.S.A. 2008 Supp. 44-523(f) contains no reference to the preliminary hearing application.

The Kansas Supreme Court has been clear in its interpretation of workers compensation law in Kansas. When a workers compensation statute is plain and unambiguous, the courts must give effect to its express language rather than determine what the law should or should not be.<sup>3</sup> Both ALJ Clark and ALJ Klein ruled properly that K.S.A. 44-523(f) provides no discretion in this instance. Claimant failed to proceed to final hearing, settlement hearing or an agreed award within five years from the date of filing an application for hearing pursuant to K.S.A. 44-534. Therefore, dismissal of this matter is mandated.

Claimant attempts to raise the issue dealing with the required filing of a report of the accident pursuant to K.S.A. 44-557(a). However, this issue was not raised before either ALJ Clark or ALJ Klein. The Board's jurisdiction is limited to questions of law and fact "as presented and shown by a transcript of the evidence and the proceedings as presented, had and introduced before the administrative law judge."<sup>4</sup> Claimant failed to raise this issue before either ALJ at any of the hearings in this matter. Respondent's brief discusses evidence dealing with an accident report purportedly related to this claimant but with a different name and social security number. It is apparent evidence relating to this issue could have been provided had the issue been timely raised. The Board is not in a position to consider issues not raised before the ALJ.<sup>5</sup>

Finally, claimant raises the question regarding the constitutionality of K.S.A. 2008 Supp. 44-523(f). The Board is not a court established pursuant to Article III of the Kansas

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<sup>3</sup> *Bergstrom v. Spears Manufacturing Company*, 289 Kan. 605, 214 P.3d 676 (2009).

<sup>4</sup> K.S.A. 2008 Supp. 44-555c(a).

<sup>5</sup> *Goss v. Century Manufacturing, Inc.*, No. 108,367, 303 P.3d 1278 (unpublished Kansas Court of Appeals decision filed July 26, 2013.)

Constitution and does not have the authority to hold that an Act of the Kansas Legislature is unconstitutional. The Board is not a court of proper jurisdiction to decide the constitutionality of laws in the State of Kansas. As such, the Board will not rule on claimant's constitutionality question in this matter. Accordingly, until an appellate court determines the constitutionality of K.S.A. 2008 Supp. 44-523(f), the Board will continue to apply the statute as written.

#### **CONCLUSIONS**

After reviewing the record compiled to date, the Board concludes the Orders of ALJ Clark and ALJ Klein should be affirmed in all respects.

#### **DECISION**

**WHEREFORE**, it is the finding, decision and order of the Board that the Orders of Administrative Law Judge John D. Clark dated June 27, 2014, and Administrative Law Judge Thomas Klein dated July 17, 2014, are affirmed.

#### **IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of October, 2014.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

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Thomas Klein, Administrative Law Judge

Ali N. Marchant, Administrative Law Judge